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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

NO. 145.

DANIEL MAGONE, COLLECTOR OF THE PORT OF NEW YORK, PLAINTIFF IN ERROR,

vs.

CLARA ROSENSTEIN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 2, 1888.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Clara Rosenstein, plaintiff, and Daniel Magone, defendant, a manifest error hath happened to the great damage of the said Daniel Magone as by his complaint appears. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and eighty-eight, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, Hon. Samuel F. Miller, senior associate justice of the said Supreme Court, the 12th day of September in the year of our Lord one thousand eight hundred and eighty-eight.

JOHN A. SHIELDS,
Clerk.

The foregoing writ is hereby allowed.

E. HENRY LACOMBE,
Circuit Judge.

2 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, clerk of the circuit court of the United States for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from three to thirty-four inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of Daniel Magone, plaintiff in error, against Clara Rosenstein, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this 27th day of October in the year of our Lord one thousand eight hundred and eighty-eight and of the Independence of the United States the one hundred and thirteenth.

[SEAL.] JOHN A. SHIELDS,
Clerk.

(Indorsed:) 11824. U. S. Supreme Court. Daniel Magone, plaintiff in error, against Clara Rosenstein, defendant in error. Writ of error. Stephen A. Walker, attorney for plff in error.

Service of a copy of the within writ of error is hereby admitted this 13th day of September, 1888.—H. Aplington, attorney for deft in error.

(Stamp:) U. S. circuit court filed Sept. 13, 1888, John A. Shields, Clerk.

3 Circuit court of the United States, for the southern district of New York.

CLARA ROSENSTEIN
vs.
DANIEL MAGONE, COLLECTOR OF CUSTOMS AT the port of New York.

JOHN A. SHIELDS,
Clerk Circuit Court U. S. Southern District of N. Y.:

You will please issue a summons to the defendant Daniel Magone in the above-entitled action, with notice for $385.00 with interest thereon from February 19th, 1887.

(Signed) H. APLINGTON,
Attorney for Plaintiff.

Office and post-office address, 116 Reade st., New York.

4 (Indorsed:) Circuit court U. S,, southern district of N. Y. Clara Rosenstein *vs.* Daniel Magone, etc. Præcipe for summons. H. Aplington, attorney for plaintiff, 116 Reade st., N. Y. City.

(File mark.) U. S. circuit court. Filed Oct. 11, 1887. Timothy Griffith, clerk.

5 United States circuit court for the southern district of New York.

CLARA ROSENSTEIN
against.
DANIEL MAGONE, COLLECTOR OF CUSTOMS AT the port of New York.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of NewYork, this 11th day of October, in the year one thousand eight hundred and eighty-seven.

(Sgd.)
[L. s.] TIMOTHY GRIFFITH, *Clerk.*

H. APLINGTON, *Plaintiff's Attorney.*
Office and post-office address, 116 Read st., New York.

6 (Indorsed:) United States circuit court, southern district of New York. Clara Rosenstein *vs.* Daniel Magone, etc. Summons with notice. H. Aplington, plaintiff attorney, 116 Reade st., N. Y. City.

To the defendant within named:

Take notice, that upon default judgment will be taken for the sum of $385.00 dollars, in money, with interest from the 19th day of February, 1887, besides costs.—(Sgd.) H. Aplington, plaintiff attorney.

(File mark.) U. S. circuit court. Filed Aug. 29, 1888. John A. Shields, clerk.

7 United States circuit court, southern district of New York.

CLARA ROSENSTEIN, PLAINTIFF,
against
DANIEL MAGONE, COLLECTOR OF customs at the port of New York, defendant. } Complaint.

The plaintiff appears herein by H. Aplington, her attorney, and for a cause of action states:

I. That at the dates hereinafter mentioned the plaintiff is and was doing business in the city of New York, under the firm name of C. Rosenstein & Co.

II. That the defendant at the dates hereinafter mentioned was and still is collector of customs at the port of New York.

III. That the plaintiff, on the 19th day of February, 1887, imported from Gothenburg, Sweden, to New York City, in the southern district of New York, three hundred and eleven cases of matches.

8 IV. That said matches, in addition to the outside or zinc lined coverings, were enclosed in certain small boxes. That all of said merchandise was invoiced at its value in Gothenburg, Sweden, the merchandise being valued in the invoice in each instance separately from the charges, and the value of said inside coverings or boxes were in said invoice separated from all other charges or values, and amounted to, in the currency of the United States, three hundred and eighty-five dollars.

That said inside boxes were and are by law exempt from duty; that said inside boxes were only holders and the usual and necessary covering of the merchandise contained in them and into which the merchandise was placed for transportation and protection and were and are of no commercial value after the removal of the contents of same.

That such inside boxes were not of any material or form designed to evade duties thereon or designed for use otherwise than in the bona fide transportation of said merchandise to the United States. That said

9 inside boxes being so exempt from duty, the defendant had not and has not the right or authority to exact from the plaintiff any charge or duty on the same. Yet so it is that the said collector, the defendant herein, on the 19th day of February, 1887, assessed and levied on said inside boxes one hundred per cent. ad valorem duty, amounting to three hundred and eighty-five dollars, which sum this plaintiff was compelled to pay, in addition to the duty legally imposed on the merchandize enclosed in said boxes.

That the plaintiff, on said 19th day of February, 1887, paid to the defendant said sum of three hundred and eighty-five dollars.

That on April 29th, 1887, and within ten days after the ascertainment and liquidation of said duties, pursuant to the Revised Statutes of the United States, this plaintiff gave notice in writing to the defendant of her dissatisfaction with his decision, in which she set forth distinctly and specificially the grounds of her objections.

That on April 29th, 1887, the plaintiff, in writing, appealed from the decision of the defendant, said collector, to the Secretary of the
10 Treasury, and the said appeal was heard by said Secretary, who affirmed the decision of the defendant, said collector, which said decision of the Secretary of the Treasury was made, published, and recorded on the 18th day of July, 1887.

And the plaintiff alleges that the decisions of the defendant, said collector, and of the Secretary of the Treasury, in reference to the assessment of duties on said importation aforesaid, are contrary to law, and the plaintiff is entitled to have said money refunded.

Wherefore the plaintiff demands judgment against the defendant for the sum of three hundred and eighty-five dollars, with interest thereon from February 19th, 1887.

H. APLINGTON,
Plaintiff's Attorney.

STATE OF NEW YORK,
City and County of New York, ss:

CLARA ROSENSTEIN, being first duly sworn on oath, deposes and says: That she is the plaintiff herein; that she knows the contents of the
11 foregoing complaint, and that the same is true of her own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters she believes it to be true.

(Signed) C. ROSENSTEIN.

Sworn to before me this 19th day of October, 1887.

(Sgd.) ALEX. WILEY,
Notary Public in and for New York County, N. Y.

12 United States circuit court, southern district of New York.

CLARA ROSENSTEIN, PL'FF,
against
DANIEL MAGONE, COLLECTOR of customs at the port of New York, def't. } Bill of particulars.

1st. The name of the importer, C. Rosenstein & Co.

2nd. The merchandise consisted of three hundred and eleven cases of matches.

3rd. The place from which importation was made, Gothenburg, Sweden.

4th. The name of the vessel, S. S. Bassano.

5th. Date of invoice, January 10th, 1887.

6th. Date of entry at custom-house at port of New York, February 19th, 1887.

7th. The precise amount of duties claimed to have been exacted in excess is three hundred and eighty-five dollars.

Protest against such exaction was filed April 29th, 1887, and appeal taken to the Secretary of the Treasury April 29th, 1887, and the said Secretary made his decision on said appeal July 18th, 1887.

13 STATE OF NEW YORK,
City and County of New York, ss:

CLARA ROSENSTEIN, being first duly sworn on oath, deposes and says, that she is the plaintiff herein, that she knows the contents of the foregoing bill of particulars, and the same is true of her own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters she believes it to be true.

(Signed) C. ROSENSTEIN.

Sworn to before me this 19th day of October, 1887.

(Sgd.) ALEX. WILEY,
Notary Public in and for New York County, N. Y.

(Endorsed:) United States circuit court, southern district of New York. Clara Rosenstein, pl'ff, agst. Daniel Magone, collector of customs of the port of New York, def't. Complaint and bill of particulars. H. Aplington, pl'ff's att'y, 116 Reade st., N. Y. City. Filed Oct. 19, 1887. (File mark.) U. S. circuit court. Timothy Griffith, clerk.

14 Circuit court of the United States for the southern district of New York.

CLARA ROSENSTEIN
vs.
DANIEL MAGONE, COLLECTOR, ETC. } U. S. 11824.

The defendant answers the complaint as follows:

I. He alleges that the small inside boxes referred to in the complaint were of a material and form designed to evade duties thereon, or were designed for use otherwise than in the bona fide transportation to the United States of the merchandize referred to in the complaint.

II. He denies that the said inside boxes were and are by law exempt from duty, and denies that said inside boxes were the usual and necessary coverings of the merchandise referred to in the complaint.

III. He denies that the plaintiff filed with defendant any protest or protests as required by section 3011 of the Revised Statutes of the United States.

15 IV. He denies that the sum stated in the complaint or any sum is now due and owing the plaintiff.

Wherefore defendant demands judgment, that the complaint be dismissed with costs.

(Signed) STEPHEN A. WALKER,
United States Attorney, Attorney for the Defendant.

SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss:

Daniel Magone being duly sworn, says that he is the defendant in the above entitled action; that he knows the contents of the foregoing an-

swer, and that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

Sworn to before me this 6 day of December, 1887.

(S'gd) D. MAGONE.
(S'gd) W. E. KIMBALL,
Notary Public, N. Y. Co.

16 (Endorsed:) U. S. circuit court, southern district of New York. Clara Rosenstein vs. Daniel Magone. Answer. Stephen A. Walker, United States attorney, attorney for defendant.

(File mark:) U. S. circuit court. Filed Dec. 7, 1887. Timothy Griffith, clerk.

17 At a stated term of the circuit court of the United States of America, for the southern district of New York, in the second circuit, held at the United States court rooms, in the city of New York, on Thursday, the 26th day of January, in the year of our Lord one thousand eight hundred and eighty-eight.

Present: The honorable E. Henry Lacombe, circuit judge.

CLARA ROSENSTEIN
vs. } 11824.
DANIEL MAGONE.

Now comes the plaintiff by H. Aplington, her attorney, and moves the trial of this cause. Likewise comes the defendant by Macgrane Coxe, assistant U. S. attorney, his attorney. Thereupon a jury is empanelled and the cause proceeds to trial.

After hearing the evidence of the plaintiff and the arguments of the counsel, the jury, by direction of the court, render a verdict for the
18 plaintiff for the sum of four hundred and seven dollars and twenty-seven (cents $407\frac{27}{100}$).

It is ordered that a certificate of probable cause be entered herein, and that the defendant have a stay of sixty days on said verdict.

An extract from the minutes.

(S'gd) JOHN A. SHIELDS,
[SEAL.] *Clerk.*

19 United States circuit court, southern district of New York.

CLARA ROSENSTEIN, PLAINTIFF,
against
DANIEL MAGONE, COLLECTOR OF CUSTOMS AT the port of New York, defendant. } 11824.

The issues in this action having been brought on for trial before Hon. E. Henry Lacombe and a jury at a trial term of this court held on the 26th day of January, 1888, and the issues having been tried and a verdict duly rendered for the plaintiff, by direction of the court, against the

defendant, for the sum of four hundred seven and $\frac{27}{100}$ dollars, and the interest and costs having been duly taxed by the clerk at sixty-three & $\frac{63}{100}$ dollars.

Now, on motion of H. Aplington, plaintiff's attorney, it is adjudged and decreed that Clara Rosenstein, the plaintiff, recover of Daniel Ma-
20 gone, the defendant, the sum of four hundred seven and $\frac{27}{100}$ dollars, the amount found by the jury, together with sixty-three and $\frac{63}{100}$ dollars costs and disbursements, amounting in the whole to four hundred and twenty & $\frac{90}{100}$ dollars, and that the plaintiff have execution therefor.

Dated New York, August 29th, 1888.

Judgment signed this 29th day of August, A. D. 1888.

(S'gd) G. E. ROGERS,
Deputy Clerk.

(Endorsed:) United States circuit court, southern district of New York. Clara Rosenstein, pl'ff, against Daniel Magone, collector, &c., of the port of New York, def't. Judgment. H. Aplington, pl'ff's att'y, 116 Reade st., N. Y. City.

(File mark:) U. S. circuit court. Filed Aug. 29, 1888. John A. Shields, clerk.

21 U. S. circuit court, southern district of New York.

CLARA ROSENSTEIN, PLAINTIFF,
vs.
DANIEL MAGONE, DEFENDANT. } N. S. 11824.

Defendant's bill of exceptions.

And afterwards, to wit, on the 26th day of January, 1888, this case came on to be tried at a stated term of this court duly holden before the Hon. E. Henry Lacombe, circuit judge, and a jury duly empaneled and sworn to try the issues herein. The parties above named appeared by counsel respectively, the plaintiff by Nelson Smith and H. Aplington, esqs., and the defendant by Stephen A. Walker, United States attorney, and Macgrane Coxe, assistant United States attorney; and during the course of the trial, and before the rendering of the verdict therein, the defendant's counsel did take and allege certain exceptions to certain rulings of the court, which said exceptions were by the court duly allowed and will hereinafter more at large appear.

To sustain the issues on her part, the plaintiff adduced evidence, showing that on or about the 19th day of February, 1887, she imported into the port of New York from Sweden 301 cases of matches, known as parlor matches, and 10 cases of matches known as safety matches; that the
22 matches themselves were packed in the first instance in small boxes containing about seventy matches each; that said boxes were made of very thin pieces of soft wood, covered with paper, and were so constructed that the receptacle containing the matches fitted snugly into the cover like a drawer, and could be slid out of the cover at either end for the purpose of enabling the matches to be withdrawn. That the defendant as collector of customs at the port of New York classified these

small soft wood boxes for duty separately from the matches, and liquidated the duties thereon, that is on the boxes, at the rate of 100 per cent. ad valorem, the cost of packing not being included therein; that the duties so levied amounted in respect to the boxes of the parlor matches to $315.43, and in respect to the boxes of the safety matches to $69.57. That the plaintiff paid said sums as duties under protest, stating as the ground of her objection to such levy that the said boxes were duty free under section 7 of the tariff act of March 3, 1883, and that said protest and the appeal to the Secretary of the Treasury required by law had been duly made, and the decision of the collector affirmed by the Secretary of the Treasury, and this action seasonably brought to recover such sums so paid, and alleged to have been unlawfully exacted as duties as aforesaid. There was no question as to the sufficiency of the protest.

The testimony as to the safety matches was that the boxes above described and immediately containing said matches had on one edge a surface especially prepared and hereinafter more particularly described on which the safety matches could be ignited and were packed in Europe for transportation to this country as follows: About a dozen of the small soft wooden boxes were done up in a package; then half a dozen of such packages were packed in a larger package, and then a number of these
23 larger packages, generally about ten gross, were inclosed in a zinc case. That this was the customary mode of packing such matches for transportation to the United States.

The sample representing the parlor match was marked Plaintiff's Exhibit 7. The sample representing the safety match was marked Plaintiff's Exhibit 8.

WILLIAM ROSENSTEIN, called and sworn as a witness for the plaintiff, testified in substance as follows:

The safety matches go to the consumer as you see them there, in the boxes, and the consumer either uses them in the boxes or takes them out of the boxes. A great many take them out of the boxes. Others take the box along with the matches as long as there is a match in it. As matter of actual practice, the consumer sometimes takes them out of the boxes and ignites them in some other way than by the use of the box. They use them so in hotels, for instance. I have noticed in a great many hotels that they have little iron boxes on the walls and put these matches in them, and then have a piece of prepared paper right under it to strike the matches on. It is very hard to say how many methods there are of using the matches without the box, so far as my experience goes. For instance, I carry them in a little box like this, (showing a box carried in his pocket). I have seen the safety match carried around in a box like the one I have just produced from my pocket. There is a little of the prepared surface on this box (the one witness took from his pocket).

With regard to the other match, the parlor match, they can be used in any way. No special surface is needed to light the parlor matches. In respect to the safety match they can be lighted with these safety papers (the prepared surface); and then there are some stands made out of very common metal that will light safety matches, not that preparation
24 at all. There is no use that I know of to which the match boxes are put to when the matches are taken out, and after the matches are taken out the boxes have no commercial value whatever.

Being cross-examined, the witness testified, on being shown Exhibit No. 8: I have not sold any matches put up in that kind of a box without the box. I have some of the matches here without the boxes. In fact I have some now that came in small paper bundles, and they were imported in that way, in paper bundles, but it was abandoned because the matches are liable to get damaged unless they are in boxes. In papers they do not seem to carry as well. The trip across the ocean don't permit those matches to come in any quantity in that way, so they have to be in those boxes. It is rather dangerous to bring them in papers. The safety match will not go off on the paper wrapper. You have to use the surface on the box (the box with the prepared surface above referred to). I have sold them in the paper package. They do not carry well. The matches have a commercial value without the box in which they come; they are being used very extensively without having those boxes with them; as I said before, they are used in hotels and on steamboats—the Stonington line, for instance, uses them. They have a little iron bracket in the staterooms, and some of the safety paper (the prepared surface) under it to strike the matches on. They are afraid to leave them in the boxes, some of the passengers would get away with the matches, so they take them out of the boxes. Those matches that are used on the Stonington line and in hotels that I speak of, are imported in these boxes (Exhibit No. 8). They are all imported now, with a very few exceptions, in this style. It may be, oh, yes, that the matches in Exhibit 8 would be protected from sea water and imported into this country just as well in boxes that did not have the prepared surface on the outside of it, but this is put on for the matter of convenience more than anything else. I might state that I usually, in selling these boxes, furnish parties with the prepared paper, because in most cases these wear out before the matches. There is scarcely sufficient striking surface, because most people here are not used to it, and they go through the whole surface of the preparation and soon wear it out. We don't sell these matches without the boxes. We can not keep them in the store without the boxes, such as this (Exhibit 8). They have a merchantable value without the boxes although they are never sold without the boxes. The consumer uses them without the boxes. The box invariably goes to the consumers, but they have a value even if the box is not with them.

Q. Therefore they have no commercial value without the box?

A. That is a different thing again. They are of value even if the box is not with them.

The COURT. Mr. Coxe is qualifying his question by the word "commercial."

Q. In trade and commerce have they any value?

A. Oh, certainly; we do not sell them by the handful without the boxes in that way.

Q. I am glad to find that out. I qualify my question by the word "commercial." I mean in trade and commerce they have no substantial value, have they?

A. All matches are sold with the box, not only the safety match, but the parlor match, sulphur match, and the Italian wax match—all sold by the box; always.

26 Continuing, the witness testified: These matches won't ignite except on some such surface, or similar surface. They are always used either with this prepared paper or with the prepared surface. I carry one of the boxes in my pocket. The prepared surface on this box is something similar to the prepared surface on Exhibit 8. I am not enough of a chemist to state what it is that causes the ignition of the match on this surface; in fact, it is considered somewhat of a secret—a trade secret; it has been for years, but now it is made in this country. Our own chemists know what it is. They analyzed the substance. The prepared surface on the box performs no more function in covering the article than the blue paper on the other sides of the box; just like any paper of that thickness, which would be on one side of a box just like that.

Redirect examination by Mr. SMITH:

The safety match does not in all cases require a chemically prepared surface to light it. It may be lighted otherwise, I have seen them lit without a chemical surface. I have seen them lit on glass. I have seen those experiments made very often. The paper being put on the wood of the box makes it more air-tight; it preserves the match better in transportation; dampness can not penetrate it, because the wood is of a very soft character. This is the usual and ordinary way of putting up these matches for transportation.

Recross-examination:

I have seen matches like these struck on a piece of glass a number of times, but I have never known that people carry around pieces of glass to strike their matches on. I reiterate that these matches are not sold—neither these nor any other, without the boxes. Speaking as a commercial man, I would not buy the safety matches without the boxes.

27 HORACE K. THURBER, called and sworn as a witness for the plaintiff, testified in substance as follows:

The boxes, Exhibits 7 and 8, have no mercantile value after the matches are used out of it. It is invariably thrown away by the user after the matches are used, so far as I know. I know of no use to which the boxes can be put except to hold the matches. The usual and ordinary way of packing matches for the purpose of transportation from the other side to this country is to put them in these boxes (Exhibits 7 and 8). Sometimes they come in larger packages. Parlor matches frequently come as high as 500 in a package. Those boxes, Exhibits 7 and 8, are wooden boxes covered with paper. There is an outside wooden box and an inside wooden box, both covered with paper. I have used imported matches. I am familiar with the effect of the sea on goods of that description and the circumstances attending the importation generally, and I know we have to use boxes like Exhibits 7 and 8 to bring them safely all the time. We not only have to have them in this way, but we also have them come in a tin box or tin cases generally. It is safer to have them in that way. When tin is used these boxes containing the matches are put inside of the tin. These boxes come a dozen in a package, and then half a dozen of them are packed in a larger package, and they are put about ten gross in a tin case most always. They come two gross in a tin case, and then they come fifty

gross, but inclosed in a zinc package, and then an outside wooden box. The matches themselves are always immediately contained in these boxes, sometimes a trifle larger, although they are collected in larger packages.

On cross-examination the witness testified in substance:

28 You could not ordinarily, I mean to be understood, in the ordinary commercial business of the country, find market for the safety matches unless enclosed in a box with the prepared surface on the outside. In packing these boxes, Exhibits 7 and 8, for transportation they are wrapped up in packages with paper around them, and they are packed in larger cases, usually made of tin.

It is admitted that the outer cases in regard to this importation were made of tin.

These boxes, take Exhibit 8 for instance, are first an outer box of some thin wood covered with paper and open at both ends; into that there slips another box without the top and fitting snugly within the outer box. When matches are being used one at a time, the under box is pushed a little way out from the upper, when the match is withdrawn and the box then put together again. And then, the safety matches are used in so many different ways. In some portions of my house we have the matches with the boxes; in other portions, in chambers, we have them where they are put into a receptacle, and prepared paper like that for use for lighting them separate from the box. I am speaking of the safety match. They are used in as many different ways as there are different notions of people. I should say that without that prepared surface on the box, Exhibit 8, the sale of the safety matches would not be nearly as large as it would with it.

The testimony as to the parlor matches was the same, except in the following particulars: That they could be ignited by being struck on any rough, dry surface; that the boxes containing them had on their

29 edge a piece of sand-paper instead of a particularly prepared surface; that they were more frequently used separate from their boxes than the safety matches, and that the outer boxes in which they were imported were made of wood instead of zinc.

At the close of the case defendant's counsel moved the court for a direction of a verdict for the defendant upon the ground that it appeared from the testimony that the boxes in question were designed for and put to another use than that of the transportation of the goods into the United States, and that consequently they were dutiable as assessed under the proviso of section 7 of the act of March 3rd, 1883.

This motion was denied by the court, to which ruling defendant's counsel duly excepted; which exception was duly allowed.

Defendant's counsel then asked leave to have submitted to the jury the question as to whether or not the boxes in question were designed for and put to another use than that of the bona fide transportation of the goods into the United States, which request was denied by the court, to which ruling defendant's counsel duly excepted, which exception was allowed by the court.

The court then directed a verdict for the plaintiff for the respective amounts sought to be recovered on the boxes containing both kinds of matches, as above described, to which ruling of the court the defendant's counsel duly excepted, which exception was allowed by the court.

The jury returned a verdict for the plaintiff in accordance with the direction of the court.

30 And inasmuch as the exceptions, matters, and things aforesaid would not otherwise appear by the record, I have settled, allowed, and signed this bill of exceptions on the prayer of the said defendant by his counsel. And

It is ordered that the same be filed as part of the record herein, with like force and effect as if the same had been reduced to writing, signed, and filed before the case was given to the jury.

Witness my hand this 10th day of August, 1888.

E. HENRY LACOMBE,
Circuit Judge.

We hereby consent that the foregoing bill of exceptions be signed.
Dated New York, Aug. 6, 188–.

H. APLINGTON,
Plaintiff's Att'y.
STEPHEN A. WALKER,
Defendant's Att'y.

(Indorsed:) U. S. circuit court, southern district of New York. Clara Rosenstein versus Daniel Magone. Bill of exceptions. Stephen A. Walker, United States attorney, attorney for defendant. U. S. circuit court. Filed Aug. 11, 1888. John A. Shields, clerk.

31 Supreme Court of the United States.

DANIEL MAGONE, PLAINTIFF IN ERROR,
vs.
CLARA ROSENSTEIN, DEFENDANT IN ERROR. } Assignment of errors.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the said court, at the Capitol in Washington, comes the said plaintiff in error, by Stephen A. Walker (his) attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said defendant in error against the said plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiff against the said defendant.

And the said plaintiff pray that the judgment aforesaid for the error aforesaid and other errors in the record and proceedings aforesaid may be reversed, annulled, and altogether held for nothing, and that he, the said plaintiff, may be restored to all things which he has lost by occasion of said judgment, &c.

(Sg'd.) STEPHEN A. WALKER,
Attorney for Plaintiff in error.

32 (Indorsed:) United States Supreme Court. Daniel Magone, plaintiff in error, vs. Clara Rosenstein, defendant in error. Assignment of error. Stephen A. Walker, attorney for plaintiff in error.

Due service of a copy of the within assignment of error is hereby admitted this 13 day of September, 1888.—(Signed) H. Aplington, attorney for in error. To H. Aplington, attorney for defendant in error.

(File mark:) U. S. circuit court. Filed Sept. 13, 1888. John A. Shields, clerk.

33 Supreme Court of the United States.

11824.] DANIEL MAGONE, PLAINTIFF IN ERROR, *vs.* CLARA ROSENSTEIN, DEFENDANT IN ERROR. } Joinder in error.

And afterwards, to wit, on the second Monday of October, in said term, the said defendant in error, by H. Aplington, his attorney, comes here into court and says that there is no error either in the record or proceedings aforesaid or in the giving of the judgment aforesaid.

And he prays that the said Supreme Court, before the justices thereof, now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

(Sg'd) H. APLINGTON,
Attorney for defendant in error.

34 (Indorsed:) 11824. United States Supreme Court. Daniel Magone, plaintiff in error, vs. Clara Rosenstein, defendant in error. Joinder in error. H. Aplington, attorney for defendant in error, 116 Reade st., N. Y. City.

Due service of a copy of the within joinder in error is hereby admitted this 21st day of September, 1888. (Sg'd) Stephen A. Walker, attorney for plaintiff in error. To Stephen A. Walker, U. S. att'y, attorney for plaintiff in error.

(File mark:) U. S. circuit court. Filed Sept. 21, 1888. John A. Shields, clerk.

35 UNITED STATES OF AMERICA, *ss:*

To Clara Rosenstein, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, eighteen hundred and eighty-eight, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Daniel Magone is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated September 12th, 1888.

E. HENRY LACOMBE,
Circuit Judge.

36 (Indorsed:) 11824. U. S. Supreme Court. Daniel Magone, plaintiff in error, against Clara Rosenstein, defendant in error. Citation. Stephen A. Walker, attorney for plaintiff in error.

Due service of a copy of the within citation is hereby admitted this 13th day of Sept., 1888. H. Aplington, attorney for defendant in error. (Stamp:) Circuit court. Filed Sep. 13, 1888. John A. Shields, C.

(Indorsement on cover:) No. 145. Daniel Magone, collector of the port of New York, plaintiff in error, vs. Clara Rosenstein. S. New York. C. C. U. S. Filed October 2, 1888.

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY
CLERK.

Circuit Court of the United States for the Southern District of New York.

CLARA ROSENSTEIN
vs.
DANIEL MAGONE, COLLECTOR.

LACOMBE, J. (orally). This case lies within a narrow compass, both as to the law and as to the facts. It calls for a construction only of section 7 of the act of 1883. The facts are few in number and there is no dispute about them. The method in which these matches are packed, the method in which they are conveyed to this country, and how they are used when they are here; what happens to the boxes during use and afterwards, is all proved in the case. It is a matter of common knowledge without proof, and it is proved here, that while there may be no use of the box disconnected from the matches, there is a use made of the box disconnected from the transportation. Now, section 7, in its latter part, contains a proviso under one branch of which the Government claims that these goods come. The proviso is as follows: "*Provided* that if any packages, sacks, crates, boxes, or coverings of any kind shall be of any material or form designed to evade duties thereon, or designed for use otherwise than in the bona fide transportation of goods to the United

States, the same shall be subject to a duty of 100 per cent ad valorem, upon the actual value of the same." If there were nothing here but this statute to be interpreted, I should feel no hesitancy whatever in holding that this phraseology imports that when these boxes or coverings are constructed upon a plan which facilitates and contemplates other use in connection with their contents while such contents are being themselves used, they are designed for a use other than in transportation to the United States. Under such a construction, if I did not direct a verdict for the defendant, he would certainly be entitled to go to the jury as to whether they found these particular articles fairly within the test of a double use.

But that is not all that there is here. The Supreme Court, upon most elaborate argument and with great care, have considered this entire subject, and have delivered an opinion in *Oberteuffer* v. *Robertson* (116 U. S., 499; 6 Sup. Ct. Rep., 462). They there interpret or paraphrase this proviso which I have read as follows: "This," says the court, meaning the proviso, "implies that if the boxes or coverings of any kind are not of a material or form designed to evade duty thereon, and are designed to be used in the bona fide transportation of the goods to the United States, they are not subject to duty." With all due respect to the learned judge who wrote this opinion, I think that his paraphrase goes beyond the text or the intent of the statute; for while the statute provided that if there was a use for these boxes designed otherwise than for transportation, although the use for transportation was also designed, they should pay duty, the paraphrase would relieve them from

the payment of duty, although they might be, and were, generally, put to an incidental use in connection with their contents other than that of transportation, provided they were bona fide used for the purpose of transporting goods. Still, that is the opinion of the Supreme Court, and it is controlling here, and I shall follow it.

The jury will render a verdict for the plaintiff, pursuant to the direction of the court, for $407.27, with interest. (34 Fed. Rep., 120.)

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY.
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1891.

DANIEL MAGONE, COLLECTOR, ETC., plaintiff in error,
vs.
CLARA ROSENSTEIN.
} No. 145.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

WM. A. MAURY,
Assistant Attorney-General.

Supreme Court of the United States.

OCTOBER TERM, 1891.

DANIEL MAGONE, COLLECTOR, ETC., plaintiff in error,
vs.
CLARA ROSENSTEIN. } No. 145.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

The defendant in error imported into the port of New York from Sweden 301 cases of matches known as parlor matches, and 10 cases of matches known as safety matches. The boxes contained about seventy matches each, and were made of very thin pieces of soft wood covered with paper, and so constructed that the receptacle containing the matches fitted snugly into the cover like a drawer and could be slid out of the cover at either end for the purpose of withdrawing the contents.

The defendant, as collector, classified the soft wood boxes for duty separately from the matches and liquidated

the duties on the boxes at the rate of 100 per cent ad valorem, the cost of packing not being included therein.

The duty so levied on the parlor-match boxes amounted to $315.43, and on the safety-match boxes to $69.57.

The importer duly protested and brought this action to recover back the duties paid in obedience to said assessment.

The case went to trial on the usual issue resulting from the petition and answer in such cases, and there was a verdict for the full amount claimed and judgment accordingly (pp. 6, 7).

At the close of the case the defendant, by his counsel, moved the court to direct a verdict for him on the ground that it appeared by the testimony that the boxes in question were designed for and put to another use than that of the transportation of the merchandise into the United States, and, consequently, that they were dutiable as assessed, under the proviso of section 7 of the act of March 3, 1883; but the court denied the motion, to which ruling the defendant excepted (p. 11).

Defendant's counsel then asked the court to submit to the jury the question whether or not the boxes in question were designed for and put to another use than that of the bona fide transportation of the merchandise into the United States; but this request was denied by the court, and thereupon the defendant excepted (p. 11).

The court then directed a verdict for the plaintiff for the amounts of duty assessed on the boxes containing both kinds of matches, respectively, and to this ruling the defendant excepted (p. 11).

ASSIGNMENT OF ERROR.

The judgment appears to be erroneous:

1. In this, that the court did not instruct the jury to bring in a verdict for the defendant;

2. In this, that the court did not submit it to the jury to determine whether or not the boxes in question were designed for and put to another use than that of the bona fide transportation of their contents into the United States;

3. In this, that the court directed a verdict for the plaintiff.

ARGUMENT.

There was quite an amount of testimony in the case, which is stated more or less fully in the bill of exceptions (pp. 1–12).

The testimony as to the safety matches was that the boxes containing them have on one edge a surface specially prepared on which the match must be struck in order to produce ignition. It was in evidence too that this prepared surface also came separate from the boxes, and was used sometimes in hotels and other public places in connection with permanent receptacles for matches; but the witness, Horace K. Thurber, said:

> *That without that prepared surface on the box, exhibit 8, the sale of the safety matches would not be nearly as large as it would with it (p. 11).*

The testimony as to the parlor matches showed that the boxes in which they came had on their edge a piece of sandpaper instead of a specially prepared surface, but that such matches could be ignited "on *any rough, dry*

surface," and were more frequently used separate from their boxes than the safety matches (p. 11).

There was other testimony as to the mode of packing both kinds of matches for transportation, and one witness said he had often seen the "*experiments*" of lighting safety matches without a chemical surface, as on glass, for instance; but this witness also said that, "*speaking as a commercial man, I would not buy the safety matches without the boxes*" (p. 10).

The undoubted effect of the testimony was to show that the surface on each box for producing ignition had for its sole object to facilitate the consumer's use of the contents of the box, and had no particular utility as a covering or protection for such contents.

Section 7 of the act of March 3, 1883 (22 Stat., 523), provides as follows:

> SEC. 7. That sections twenty-nine hundred and seven and twenty-nine hundred and eight of the Revised Statutes of the United States, and section fourteen of the act entitled "An act to amend the customs revenue laws, and to repeal moities," approved June twenty-second, eighteen hundred and seventy-four, be, and the same are hereby, repealed, and hereafter none of the charges imposed by said sections or any other provisions of existing law shall be estimated in ascertaining the value of goods to be imported, nor shall the value of the usual and necessary sacks, crates, boxes, or covering of any kind be estimated as part of their value in determining the amount of duties for which they are liable: *Provided*, That if any packages, sacks, crates, boxes, or coverings of any kind shall be of any material or form designed to evade duties thereon, or designed for use otherwise than in the bona fide transportation of goods to the United States, the same shall be subject to a duty of one hundred per centum ad valorem upon the actual value of the same.

The precise effect of the *proviso* of this section was not, perhaps, considered in *Oberteuffer* v. *Robertson* (116 U. S., 499), the cartons, etc., used in that case being clearly for the sole purpose of protecting the merchandise during

transportation, nor has the *proviso* been the subject of decision in any subsequent case in this court.

The duty of 100 per cent was assessed on the value of the boxes in which the matches were imported, in obedience to the requirement of the proviso that such assessment should be made in all cases where coverings of any kind, in which merchandise was imported, were "of any material or form designed to evade duties thereon, *or designed for use otherwise than in the bona fide transportation of goods to the United States.*"

It was held by the collector, and properly held, we submit, that the prepared surface put on each match box contained in the importation showed an intention that the box should perform an important, not to say necessary, function in the consumption of its contents.

Indeed, it is clear that safety matches would hardly be merchantable without a prepared surface on each box. And while the prepared surface on the parlor-match box is not so necessary, it answers an important end in facilitating ignition, and thereby tending to protect the walls and furniture of houses from being used for that purpose.

It would seem, therefore, that in assessing duty, as stated, the collector acted in conformity to the law.

On November 17, 1886, the precise question involved in this record came before Attorney-General Garland (18 Op.), and was disposed of by him in accordance with the contention in this brief. His opinion is as follows:

DEPARTMENT OF JUSTICE,
Washington, D. C., November 17, 1886.

SIR: I have considered your communication asking an opinion [upon the question] whether the boxes in which safety and ordinary matches are imported are dutiable as part of the merchandise they contain and at

the same rate, or at one hundred per cent ad valorem under the proviso of the seventh section of the act of the 3d of March, 1883 (22 Stat., 523).

By "boxes" I understand you to mean "*the usual and necessary*" boxes in which this species of merchandise is sold and imported.

I think it very clear that such boxes are not dutiable as part of the merchandise they contain, for it is the express mandate of the seventh section of the act referred to that "the value of usual and necessary sacks, crates, boxes, or coverings of any kind shall not be estimated" as part of the value of any goods entered for importation. Certainly there is no longer room for question on this point since the decision of the Supreme Court in *Oberteuffer* v. *Robertson* (116 U. S., 499).

It remains, therefore, to inquire whether the boxes in question are dutiable under the proviso of the seventh section of the act, which is in these words:

"If any packages, sacks, crates, boxes, or coverings of any kind shall be of any material or form designed to evade duties thereon, or designed for use otherwise than in the bona fide transportation of goods to the United States, the same shall be subject to a duty of one hundred per centum ad valorem upon the actual value of the same."

The boxes containing the safety matches have on the outside a prepared surface upon which the matches must be scraped or ignition can not be produced, at least without great difficulty. The boxes containing the ordinary matches have on the outside a roughened surface, like sandpaper, by scraping on which this kind of matches may be ignited, although such scraping is not at all necessary to produce ignition, which may be caused by scraping on any surface offering the necessary resistance.

In each case the boxes are composed in part of a material designed for a use other than of "a bona fide transportation" of their contents. To be sure, in the case of ordinary matches this use is of a somewhat inconsiderable value, but still it is one which is designed and which, at the same time, has nothing to do with the transportation of the matches, and, therefore, brings the box of which it is an adjunct as clearly within the proviso as the prepared surface of the safety-match box brings it within the proviso.

In *United States* v. *Thurber* (28 Fed. Rep., 59) the court seems to lay down that to make the box dutiable under the proviso the additional use must appear to be "substantial, material, and valuable," but I have reached the conclusion that it is enough for that purpose to show that such use was designed to be unconnected with the transportation of the contents of the box. To go further and require that such use shall be "substantial, material, and valuable," is, it seems to me, to add to the statute.

It results, therefore, that the boxes in both cases are dutiable under the proviso of the seventh section of the act.

I have the honor to be, sir, your obedient servant,

A. H. GARLAND.

The SECRETARY OF THE TREASURY.

This opinion was followed by one to the same effect by Attorney-General Miller on April 21, 1890 (19 Op., 543), the question being whether the collector at Philadelphia had properly assessed a duty of 100 per cent ad valorem on certain boxes containing philosophical instruments, "each box having a sliding lid and a metal handle, for the purpose of convenience in carrying, and being of sufficient dimensions to hold one instrument."

The learned Attorney-General said:

> To my mind it is clear that these boxes were intended to follow their contents into consumption, and to be constantly used in immediate connection with those contents, both as a protection to them and as furnishing a more convenient way of carrying them about, and therefore that they were "*designed for use otherwise than in the bona fide transportation*" of their contents to the United States, and were, consequently, dutiable at 100 per cent ad valorem under the proviso of the seventh section.
>
> Upon the same ground Mr. Attorney-General Garland held, in an opinion dated November 17, 1886, that the boxes in which parlor and safety matches were imported were liable to duty, because the surface on each box, for the purpose of producing ignition of the match, showed a design that the box should be used otherwise than for the bona fide transportation of its contents, and the Attorney-General refused to follow the case of *United States* v. *Thurber* (28 Fed. Rep., 56), where it was laid down to the jury that the same kind of match boxes were not dutiable unless they found from the evidence that the boxes were intended to subserve "a *substantial, material, and valuable use;*" thus, as the Attorney-General remarks, giving the statute a sense its language does not warrant, by putting a restriction on the sense of the word "use."
>
> In *Rosenstein* v. *Magone* (34 Fed. Rep., 120) the United States circuit court for the southern district of New York held, but apparently contrary to its own convictions, that match boxes of the kind mentioned were exempt from duty under what, it seems to me, was a mistaken view of *Oberteuffer* v. *Robertson* (116 U. S. R., 499); for when the language of of the Supreme Court is applied to the facts of that case, where there was no pretense that the boxes or coverings in question could have been designed for any other purpose than the bona fide transportation of their contents, it is quite evident that the case does not bear the construction placed on it by the learned circuit judge. No question arose in that case as to any ulterior use of the boxes or coverings in controversy, and I can not see that the mind of the court was directed to any such question.
>
> But, however it may be with reference to match boxes of the sorts mentioned, it seems clear to my mind that such things as boxes or cases for philosophical instruments, made of expensive woods, with useful or ornamental mountings, were not intended to be free of duty.

As was said in that opinion by the learned Attorney-General, the learned circuit judge ruled against the collector in this very case against his own convictions of the law, in supposed obedience to the case of *Oberteuffer* v. *Robertson* (*supra*); but it is respectfully submitted that that case lends no support to the judgment.

There was no pretense in that case that the cartons, etc., were used to evade duty or were for any further purpose than the protection of the goods during transportation, and the court held in that case that under the statute the value of such cartons, etc., formed no part of dutiable value.

But no such question as is here involved was before the court in that case, and the language of the court is to be taken in connection with the real question before it.

"It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." (*Cohens* v. *Virginia*, 6 Wh., 399, 400, per Marshall, C. J.)

The position taken by Judge Addison Brown in *United States* v. *Thurber* (28 Fed. Rep., 56, 59) that to make an ulterior use of a box or covering which would warrant a collector in assessing 100 per cent duty on the value thereof such use must be "*substantial, material, and valuable*," as distinguished from a "*merely trivial*" use, involves a distinction which does not appear to have any basis in the statute; in saying which, however, we do not mean to be

understood as conceding that the use the match boxes in question are put to as means or facilities for the consumption of their contents is a "trivial" use.

In conclusion, we submit that, according to the plain words of the *proviso* of section 7, the rulings of the court below are erroneous and that the judgment should be reversed.

Wm. A. Maury,
Assistant Attorney-General.

Office Supreme Court U. S.
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OCT 23 1891
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C. G. Burgoyne's Printing Business, 146-150 Centre St., N. Y.

Supreme Court of the United States.

DANIEL MAGONE, Collector of the Port of New York,
Plaintiff in Error,

vs.

CLARA ROSENSTEIN,
Defendant in Error.

STATEMENT.

The plaintiff in error at the dates of the importation and payment hereinafter mentioned was Collector of the Port of New York. The defendant in error was at said dates doing business in the City of New York, and a portion of such business being the importation of matches.

That on the 19th day of February, 1887, the defendant in error imported into the port of New York three hundred and eleven cases of matches, three hundred and one cases of said matches being known as parlor matches, and ten cases of said matches being known as safety matches (folio 21). The matches in the first instance were packed in small boxes containing about seventy matches each, said boxes being made of thin pieces of soft wood, covered with paper, and were so constructed that the receptacle containing the matches fitted snugly into the cover like a drawer, and could be

slid out of the cover at either end for the purpose of enabling the matches to be withdrawn (folio 22). A dozen of the small wooden boxes above referred to constituted a package, then half a dozen of such packages formed a larger package, and then a number of these larger packages were enclosed in a zinc-lined case (folio 22).

The plaintiff in error, as Collector of Customs at the Port of New York, levied and assessed upon said small wooden inside boxes one hundred per cent. *ad valorem* duty (fol. 22). The defendant in error on the 19th day of February, 1887, paid the sum so levied under protest, and claiming that said boxes were free from duty under Section seven of the Tariff Act of March, 3d, 1883 (fol. 22). The protest and appeal required by law was duly made, and the decision of the said Collector was affirmed by the Secretary of the Treasury.

Thereupon this action was instituted to recover the sums so paid (fol. 22). The action came on to be tried before Hon. E. HENRY LACOMBE, Circuit Judge, and a jury, on January 26th, 1888 (fol. 21). By direction of the Court the jury rendered a verdict for the plaintiff for the full amount sought to be recovered on the boxes containing both kinds of matches (fol. 29).

POINTS.

I.

Revenue laws should be construed liberally, and, in accordance with the intent of the legislators and in cases of doubt, should be construed strongly against the Government.

In United States vs. Wigglesworth, 2 Story, 369, Judge STORY says: "In the first place, it is, as I conceive, a general rule in the interpretation of all statutes levying taxes or duties upon subjects or citizens, not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out, although standing upon a close analogy. In every case, therefore, of doubt such statutes are to be construed strongly against the Government and in favor of the subjects or citizens, because burdens are not to be imposed, nor presumed to be imposed, beyond what the statutes expressly and clearly import."

In Felton vs. United States, 6 Otto, 702, it was held, that the spirit and purpose of an act are not to be lost sight of in a strict adherence to its letter.

Judge STORY in The Sloop Falmouth, &c., 1 Gall., 133, says:

"I know no duty imposed on a Court to hunt through dark and doubtful passages to catch a glimmering meaning, whereby to load the citizen with penalties and forfeitures. In a doubtful case it is a sound rule of construction that the words are to be expounded in favor of the citizen and against the legislators."

It is held in Taylor vs. United States, 3 How., 210, and in Cliquot's Champagne, 3 Wall., 145, that revenue laws should be so construed as to carry out the intention of the legislature in passing them.

In Smythe vs. Fiske, 23 Wall., 380, the Court say:

"Revenue laws are to be construed liberally to carry out the purposes of their enactment. Their penal provisions are not penal in the sense that requires a rigidly strict construction. Where doubt exists as to the meaning of a statute, the title may be looked to for aid in its construction. The pre-existing law, and the reason and purpose of the new enactment are also considerations of great weight."

In United States vs. One Hundred Barrels of Spirits,

2 Abb., 314, it is held that the legislative intention is the guide to true judicial interpretation, and that in construing revenue laws it is the duty of the Court to study the whole statute, its policy, its spirit, its purpose, its language, and to give to the words used their obvious and natural import.

II.

The inside wooden boxes in question were under Section seven of the Act of March 3d, 1883, exempt from duty.

Section seven of the Act of March 3d, 1883, is as follows:

"SEC. 7. That Sections twenty-nine hundred and seven and twenty-nine hundred and eight of the Revised Statutes of the United States, and Section fourteen of the act entitled 'An Act to amend the customs' revenue laws and to repeal moieties,' approved June twenty-second, eighteen hundred and seventy-four, be, and the same are hereby, repealed, and hereafter none of the charges imposed by said sections or any other provisions of existing law shall be estimated in ascertaining the value of goods to be imported, nor shall the value of the usual and necessary sacks, crates, boxes or covering of any kind be estimated as part of their value in determining the amount of duties for which they are liable; provided, that if any packages, sacks, crates, boxes or coverings of any kind shall be of any material or form designed to evade duties thereon, or designed for use otherwise than in the *bona fide* transportation of

goods to the United States, the same shall be subject to a duty of one hundred per centum *ad valorem* upon the actual value of the same."

While it is true that the claim made on behalf of the Government is that the match boxes in question are subject to duty under the *proviso* of the above section, which *proviso*, we claim, was enacted for the purpose of punishment for attempting to evade duties and nothing else, it is well to consider whether in any view that can be taken it was the intent of the legislators to impose any duty at all, much less a duty in the nature of a penalty of one hundred per cent. In order to do this it is necessary to briefly refer to the laws in force prior to the passage of the Act of March 3d, 1883; for as stated in Smythe vs. Fiske, *supra:* "The pre-existing law, and the reason and purpose of the new enactment, are also considerations of great weight."

The defendant in error claims that the words "nor shall the value of the usual and necessary sacks, crates, boxes or covering of any kind be estimated as part of their value in determining the amount of duties for which they are liable" of the Act of March 3d, 1883, include the inside wooden boxes in question.

The Tariff Act of 1795 places a duty upon the actual cost of all goods imported, including "all charges, commissions, *outside* packages and insurance only excepted."

The Tariff Act of 1823 provided that to the value of the merchandise should be added "*all charges* except insurance." The Tariff Act of 1828 also provides that "*all charges*" shall he added to the cost of goods imported, and so do the Acts of 1832, 1846 and 1851.

In the Tariff Act of 1864, in order to provide all revenue possible to meet the enormous expense caused by the war, added to the cost of goods imported, among other things, "*the value of the sack, box or covering of any kind.*"

The Tariff Act of 1874 adds to the cost of the mer-

chandise imported, the "*cost of packages, boxes or other articles containing such goods.*"

Section 2907 of the Tariff Act of 1869 adds to the cost of the merchandise imported "the value of the sack, box *or covering of any kind in which such merchandise is contained.*"

It seems clear from reading the above-cited acts, that as the Government during the periods referred to was in great need of money, that it was the intention to place a duty upon coverings. But when the credit of the Government was firmly established, and the Treasury was well supplied with cash, and the surplus became large, it would seem wise to reduce taxation and give the taxpayers the benefit of the prosperous condition of the Government.

The defendant in error claims that to accomplish this purpose Section 7 of the Act of March 3d, 1883, was enacted.

The inside wooden boxes are, of course, *coverings*, and we contend that if they are the *usual and necessary* coverings that they are clearly exempt from duty under said act.

It is in evidence in this case that placing the matches in the small inside wooden boxes and then packing as hereinbefore described "was the customary mode of packing such matches for transportation to the United States" (fol. 23).

William Rosenstein, a witness called on behalf of the plaintiff in the Court below, testified: "The trip across the ocean don't permit those matches to come in any quantity in that way (wrapped in paper), so they have to be in those boxes" (fol. 24).

Horace K. Thurber, a witness called on behalf of the plaintiff in the Court below, testified: "The usual and ordinary way of packing matches for the purpose of transportation from the other side to this country is to put them in these boxes" (fol. 27).

No evidence was offered on behalf of the defendant

in the Court below, and the above evidence is undisputed. If, then, the small wooden boxes are *coverings*, and the *usual* and *necessary* coverings, they are exempt from duty unless they are liable to a duty in the nature of a penalty under the *proviso* of section seven aforesaid.

As appears by reference to the case of United States vs. Thurber *et al.*, 28 Federal Reporter, 56, an attempt was made by the Government in the United States District Court for the Southern District of New York to collect a duty on match boxes of the character of those in question herein, of thirty-five per cent. The decision in that case was in favor of the defendant, the jury finding that such boxes were the usual and necessary coverings for the merchandise contained therein, and exempt under section seven aforesaid.

The question as to the right to levy a duty upon such boxes and as to the proper construction of section seven and the *proviso* of said section was referred by the Secretary of the Treasury to the then Attorney-General of the United States (Mr. Garland) whose opinion on the subject appears in Vol. 18, 510, of Opinions of Attorneys-General. In his opinion the learned Attorney-General says: "I think it very clear that such boxes are not dutiable as part of the merchandise they contain, for it is the express mandate of the seventh section of the act referred to that 'the value of usual and necessary sacks, crates, boxes or coverings of any kind shall not be estimated' as part of the value of any goods entered for importation. Certainly there is no longer room for question on this point, since the decision of the Supreme Court in Oberteuffer vs. Robertson (116 U. S. 499)." The learned Attorney-General then gives it as his opinion that such boxes are dutiable at one hundred per cent. under the *proviso* of said section seven, for the reason that on the outside of the box is a material used for lighting the match, which in the opinion of said Attorney-

General, makes it evident that the box was designed for *use* other than in the "*bona fide* transportation" of the contents of the box.

This last proposition will be considered under the next point.

III.

The inside wooden boxes in question were not liable to duty under the proviso of Section seven of the Act of March 3d, 1883.

The claim is made that because of the preparation, or prepared surface, on the side of the boxes that it is evident that they were designed for use other than in the *bona fide* transportation of the contents of the boxes.

The number of cases of matches involved in this litigation is three hundred and eleven, of which number three hundred and one cases were *parlor* matches. In regard to such parlor matches the learned Attorney-General, in his opinion above referred to, uses the following language: "To be sure, in the case of ordinary matches this use is of a somewhat inconsiderable value, but still it is one which is designed and which, at the same time, has nothing to do with transportation of the matches, and, therefore, brings the box, of which it is an adjunct, as clearly within the proviso as the prepared surface of the safety match box brings it within the proviso."

The evidence introduced herein establishes the fact that the inside boxes have no commercial value and are put to no use after the matches are taken out (folio 24).

It was also proven by evidence that stands uncontradicted, that no special surface is needed to light the

parlor matches (folio 23), and that the safety matches are often lighted on safety papers detached from the box, and that the safety matches are often taken from the boxes and placed in other pocket boxes with a prepared service on the side, or, as often used in hotels, placed in small iron boxes and lighted on the detached prepared surface (folio 23). It was also proven by the plaintiff in the Court below, and undisputed, that the safety matches can also be lighted on glass (folio 26). It is also a fact that such safety matches can be lighted by striking quickly across a piece of legal-cap paper. In the light of the decisions above cited, declaring that the intent of the legislators should be inquired into, and in view of the facts proven in this case, is it reasonable to suppose that it was ever contemplated that a duty of one hundred per cent., *being a penalty*, should be imposed on match boxes, while the contents of such boxes were assessed only thirty-five per cent.?

The defendant in error respectfully contends that the words, "or designed for use otherwise than in the *bona fide* transportation of goods to the United States," contained in the proviso of said Section seven, were intended to embrace coverings "designed for use otherwise," &c., *only where* such coverings were so "designed for use otherwise," &c., *with intent to evade duties thereon.*

Should matches be imported in gold boxes and the claim made that such gold boxes were exempt from duty as coverings, it would be self-evident that the importation of matches in such a manner was done with intent to evade duties thereon and, the proviso of said Section seven would apply.

The said proviso, taken as a whole, clearly was intended to apply to cases where an intention to defraud the Government is manifested.

There will be no claim made in this case that the defendant in error ever intended to evade duties by placing the preparation upon the side of the match boxes, and the evidence above referred to clearly establishes the

fact that such boxes were designed to be used in the *bona fide* transportation of the goods to the United States. Thus this case comes within the doctrine of this Court in the case of Oberteuffer vs. Robertson, 116 U. S., 499. In said case, in construing the proviso of said Section seven, after quoting said proviso, the Court say:

"This implies that if the boxes or coverings of any kind are not of a material or form designed to evade duties thereon, and are designed to be used in the *bona fide* transportation of the goods to the United States, they are not subject to duty. If either of these things occurs, they are subject to 100 per cent. duty. There is not in the present case any suggestion that the cartons were of a form or material designed to evade duties thereon. They were of the usual kind known to the trade before the law was passed, as customarily used for the same purpose. They were designed to be used in the *bona fide* transportation of the goods to the United States, not only because they were and had been a customary article in the trade for covering and transporting these goods, but because they were intended to accompany the goods and remain with them in the hands of the retail dealer until the goods should be sold to the consumer."

In said case of Oberteuffer vs. Robertson, *supra*, the Court also say: "It is urged that the carton is not incident to the transportation of the goods, but is part of their preparation for sale abroad; that it is an integral part of the value of the whole, carton and goods, as a unit; that, in valuing such unit, nothing more is done than valuing the goods, ready for sale; and that, although, in one sense, the carton is a charge, it is a charge incurred in putting the merchandise into the conditions in which it is sold abroad, and it becomes part of the goods, and its value is merged in the value of the filled carton. The sufficient answer to these suggestions is, that they allow no weight to the decla-

ration of the statute that the value of the usual and necessary box or covering, of any kind, shall not be estimated as part of the value of the goods, in determining the amount of duties for which the goods are liable. The carton is the usual box or covering. It is a necessary box or covering within the meaning of the law, on the facts shown in the bill of exceptions. It was a box or covering in which the goods were contained, and so was a charge specifically imposed by § 2907 of the Revised Statutes, and § 7 of the Act of 1883 says that no charge imposed by § 2907 shall be estimated in ascertaining the value of the goods."

It is quite probable that the counsel for the plaintiff in error, will cite in his brief the case of Martindale vs. Cadwalader, 42 Federal Reporter, 403, and claim that said case supports the theory adopted by the other side in the case at bar. The case above referred to was an action brought to recover back a duty of 100 % levied under the *proviso* of section seven of the Tariff Act of March 3d, 1883, said duty being levied upon the value of tin boxes in which crackers were imported. The contention on the part of the importer was that such tin boxes were the usual and necessary coverings for the crackers and under said section seven exempt from duty. It was proven in that case that tin was the material generally used for the coverings of such articles in transportation, but it was also proven in said case that the tin boxes used in that importation *were highly ornamented and embossed*, and after being emptied of their contents *were sometimes used for household purposes.*

A verdict for the defendant was rendered in the above case.

On the day following the trial of the case just referred to, and in the same Court and before the same Judge (Judge BUTLER) and a jury the case of Winters vs. Cadwalader, 42 Federal Reporter, 405, was tried.

That action was instituted to recover back a duty of

100% levied upon boxes containing cubic blocks "upon the lids of which was pasted a picture into which the contents could be arranged." The opinion of Judge BUTLER, as to the proper construction of the proviso of said Section 7, very clearly appears in his charge to the jury, in which, among other things, he said: "Is it a justifiable conclusion that because the manufacturer pastes a picture on the lid instead of putting it inside and allowing the child, when he opens the box, to place the picture on the lid, that the box or any part of it is designed for any other purpose than of transportation? I do not hesitate to say to you that, in the judgment of the Court, it is not."

The Court also charged the jury that the case then on trial "differs altogether in its aspects" from the cracker box case above referred to. The verdict was for the plaintiff.

IV.

The entire absence of evidence proving, or tending to prove, an intent on the part of the defendant in error to evade duties and thereby defraud the Government, and by giving the proviso of Section 7 of the Tariff Act of March 3d, 1883, a reasonable construction, demands that the judgment herein should be affirmed.

Respectfully submitted,

H. APLINGTON,

Of Counsel for Defendant in Error.

Office Supreme Court U. S.
FILED.
OCT 28 1891
JAMES H. MCKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES.

October Term, 1891. No. 145.

DANIEL MAGONE, Collector of the Port of New York,
Plaintiff in Error,

vs.

CLARA ROSENSTEIN,
Defendant in Error.

Brief and Points of the Counsel for the Defendant in Error.

NELSON SMITH,
Of Counsel for Defendant in Error.

HENRY APLINGTON,
Attorney.

New York:
HAMILTON PRINT, 12 BARCLAY STREET. TELEPHONE 67 CORTLANDT.
1891.

II.—The matches were packed in Europe for the purpose of transportation to the United States in the customary way (fols. 23, 24, 27).

(**1**). They were packed in small boxes, about 70 matches in each box (fol. 22).

(**2**). These small boxes were made of very thin pieces of soft wood covered with paper, and were so constructed that the receptacle containing the matches fitted snugly in the cover like a drawer, and could be slid out of the cover at either end (fol. 22).

(**3**). About a dozen of the small, soft wooden boxes were bunched together in a package, then half a dozen of such packages were packed in a larger package, and a number of these larger packages, generally about ten gross, were enclosed in zinc cases (fol. 22¾).

III.—The defendant in the action, as Collector of Customs at the Port of New York, classified these small soft wooden boxes for duty separately from the matches, and liquidated the duties thereon—that is, on the boxes, at the rate of 100 per cent. *ad valorem*, the cost of packing not being included therein. The duties so levied amounted in respect to the boxes of Parlor matches to $315.43, and in respect to the boxes of Safety matches to $69.57.

IV.—The plaintiff in the action paid said sums as duty under protest, stating, as the ground of her objection to such levy, that the boxes were not subject to duty under Sec. 7 of the Tariff Act of March 3d, 1883 (fol. 22).

V.—The record shows that the protest and all other preliminary steps necessary to be taken to entitle the plaintiff to commence this action had

been observed, and that this action was commenced within the time limited by law (fol. 22).

VI.—There was no question raised as to the sufficiency of the protest (fol. 24¾).

VII.—The plaintiff in the action called two witnesses, William Rosenstein (fol. 23) and Horace K. Thurber (fol. 27). No other witnesses were called, and the defendant in the action offered no evidence.

VIII.—The match boxes containing the Safety matches—10 cases—had on one edge a surface especially prepared, on which they, the Safety matches, could be ignited (fol. 22¾); but they could be ignited without resort to this especially prepared surface by having a piece of prepared paper, separate from the box (fols. 23, 26, 28), or by using common metal match safes, with a smooth surface (fols. 23¾, 24), or by using a smooth glass surface (fols. 26, 27).

The Parlor matches could be lighted without the prepared surface (fols. 23¾, 28¾). They could be ignited by being struck on any rough, dry surface, and were more frequently used separate from their boxes than the Safety matches (fol. 28¾).

IX.—Putting matches in boxes in the way these were packed, was the usual and customary mode of packing matches in Europe for transportation to the United States (fols. 23, 24, 27), and they go to the consumer in that form (fols. 23, 25½, 26¾).

X.—The experiment of importing them wrapped in papers was tried, but was abandoned, because matches were liable to be damaged unless put in boxes (fol. 24).

XI.—There was no conflict in the testimony, and no dispute about the facts.

XII.—At the close of the testimony the counsel for the defendant in the action moved the Court for the direction of a verdict for the defendant, on the ground that it appeared from the testimony that the boxes in question were designed for and put to another use than that of the transportation of the goods to the United States, and that consequently they were dutiable as assessed under the provisions of Sec. 7 of the Act of March 3d, 1883.

This motion was denied and an exception taken (fol. 29).

The counsel for the defendant below then asked leave to have submitted to the jury the question whether or not the match boxes were designed for and put to another use than that of the *bona fide* transportation of the goods. Denied and exception (fol. 29).

XIII.—The Court then directed a verdict for the plaintiff in the action for the respective amounts paid by her, and which had been exacted as duties on the boxes containing both kinds of matches. Exception (fol. 29).

XIV.—The point was not taken in the answer of the defendant below, nor on the trial, that the boxes were of a material or form designed to evade duties.

POINTS.

First.—The Court very properly directed a verdict for the plaintiff in this action for the amount she had been compelled to pay the defendant, as

collector, for duties exacted by him on the match boxes, and the exception to such direction was not well taken (fol. 29).

I.—It is now well settled that, under the Statute, an importer of merchandise is entitled to recover back moneys illegally exacted as duties and paid by him under protest.

Arnson v. *Murphy, Collector*, 109 U. S., 238.

Before the Statute, the remedy of the importer who paid duties illegally exacted under protest, was complete at common law.

Schmeider v. *Barney*, 13 Blatch., 42.
Elliott v. *Swartwout*, 10 Peters, 137.

II.—The duties were illegally exacted. The match boxes were not subject to duty. Sec. 7 of the Act of Congress of March 3d, 1883, repealed all statutes then in force which required the value of boxes or coverings of any kind in which merchandise was imported to be added to the cost of the merchandise for the purpose of liquidating duties, and made the match boxes as such free of any duties whatever.

Oberteuffer v. *Robertson*, 116 U. S. Repts, 494.

The section had this proviso: "Provided that if any packages, sacks, crates, boxes or coverings of any kind shall be of any material or form designed to evade duties, or designed for use otherwise than in the *bona fide* transportation of the goods to the United States, the same shall be subject to a duty of one hundred per cent. *ad valorem* upon the actual value of the same."

III.—This proviso should be strictly construed.

U. S. v. *Dickson*, 15 Peters, 165.

Mr. Justice Story delivered the opinion of the Court in that case, and in construing a proviso, said: "We are led to the general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause, and those who set up any such exception, must establish it as being within the words as well as within the reason thereof."

IV.—There was no claim, either in the answer or upon the trial, that the match boxes were of a material or form designed to evade duties.

V.—This court, in the *Oberteuffer* case, has already placed a construction upon the proviso to Sec 7 by holding that boxes in customary use for transportation in which merchandise was imported, which were intended to accompany the merchandise into the hands of the retail dealer and thence to the consumer, were not, on that ground, within this proviso.

Oberteuffer v. *Robinson*, 116 U. S. Repts., 511, 512.

VI.—This proviso was not intended to make the boxes or coverings of imported goods subject to duty, but only to prevent frauds on the revenue laws, under the guise of boxes or coverings. The true meaning of the proviso is this: If the boxes or coverings are the ordinary ones used in transporta-

tion and have no mercantile value apart from the merchandise imported in them, and cannot be put to any use when separated from it, then they are not within the proviso. Such an interpretation is in harmony with the spirit of the act, and visible as the inspiring principle of the decisions in *Oberteuffer* v. *Robertson*, *supra*, and *Tryon* v. *Hartranft*, 31 Fed. Rep., 443.

In the Oberteuffer case boxes in which gloves were imported and which accompanied them into the hands of consumers were held not to be within the proviso. They were not of a material to evade duties, and could not be put to any use apart from the gloves.

In *Tryon* v. *Hartranft*, *supra*, the boxes in which percussion caps were imported were held not within the proviso. They were not of any use apart from the caps.

VII.—The evidence was undisputed that the match boxes were the usual and ordinary coverings for transportation of matches across tho ocean, and the fact is self-evident that these match boxes had no value, and could not be put to any use separate from the matches.

VIII.—The most that can be said of the safety match boxes, having regard to the prepared surface for lighting, is this: That they made the use of the matches by the consumer more convenient, but there was nothing in the material or form of the boxes that made them of any use or value, apart from the matches imported in them. The parlor matches required no friction surface on the boxes, they could be ignited on any rough hard surface (fols. $23\frac{3}{4}$ and $28\frac{3}{4}$).

An intent to create a public policy against the making of articles to suit the convenience of consumers is not to be ascribed to Congress, unless expressed with irresistible clearness.

IX.—As this proviso was not intended to impose a duty on match boxes, but was intended solely to prevent frauds against the Revenue laws, it is to be regarded as a statute imposing a penalty—punishment—for acting with a fraudulent intent. The material word in the proviso is "design," which means an intention, a purpose, a scheme, a plan of action to bring goods into the United States for use primarily other than as coverings in the *bona fide* transportation of merchandise, and thereby defraud the Treasury. The burden of proof of such a design was upon the defendant in the action. This principle is elementary.

X.—The proviso being highly penal, we ask the Court to remember the well settled rule that it should not be extended by implication.

Van Dyck v. *McQuade*, 86 N. Y., 56.

XI.—There is another rule we invoke, namely, that Revenue laws should be construed strictly against the Government.

U. S. v. *Wigglesworth*, 2 Story, 369.

Second.—The exception to the ruling of the Court refusing to submit to the jury the question whether the boxes were designed for a use other than the *bona fide* transportation of the matches into the United States was not well taken (fol. 29).

I.—When the evidence is not sufficient to sustain a verdict in favor of a party, so that one based thereon would be set aside, the Court is not bound

to submit the case to the jury, but may direct them what verdict to render.

Herbert v. *Butler*, 97 U. S., 319, 320.
Anderson Co. Commissioners v. *Beall*, 113 U. S., 240-242.

II.—Here there was no evidonce to authorize the jury to find that the match boxes were designed for use other than for transportation to the United States, and as an incident to accompany the matches through the hands of the retail dealers to consumers.

There was no evidence that they could be put to any use apart from the matches imported in them.

Third.—The exception to the direction of the verdict (fol. 29) was not well taken if the verdict was correct for any sum whatever.

I.—A general exception covering several propositions is untenable when the ruling is correct as to any portion of the propositions.

Arnold v. *People*, 75 N. Y., 603.
Decker v. *Matthews*, 12 N. Y., 363.
Kleunder v. *Lynch*, 4 Keys, 361.
Caldwell v. *Murphy*, 11 N. Y., 416.
Aymault v. *Pacific Bank*, 47 N. Y., 570.

II.—The parlor matches could be lighted on any rough surface. The sand paper surface was wholly unnecessary for their use. We submit that there can be no question that they were not within the proviso to Section 7. Therefore if the Court should hold that the boxes of the safety matches came